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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

STATE OF WASHINGTON, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, a federal agency, et al. Defendants.	NO. 4:19-cv-05210-RMP PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF PRIVILEGE LOG AND DISCOVERY ON COUNT IV OF FIRST AMENDED COMPLAINT Noted for: January 29, 2020 Without Oral Argument

I. INTRODUCTION

Plaintiff States assert two independent challenges to Defendants' Final Rule: a statutory challenge under the Administrative Procedure Act (APA), and a constitutional challenge under the Fifth Amendment's Equal Protection guarantee. In seeking to prove their claims, Plaintiffs are entitled to the usual discovery that would be afforded any other litigant had the claims been brought in separate actions. Even so, Defendants have refused to comply with two reasonable requests.

First, Defendants have declined to provide a privilege log identifying documents withheld from the administrative record. But a privilege log is consistent with practice in the Ninth Circuit and district courts in Washington. Without this information, Defendants cannot carry their burden to "demonstrate that the privilege applies." *Tornay v. United States*, 840 F.2d 1424, 1426 (9th Cir. 1988).

Second, Defendants insist that Plaintiffs may not conduct discovery beyond the administrative record in connection with the Equal Protection claim. But that argument is contrary to the weight of authority and ignores that Plaintiffs would be entitled to discovery on the constitutional claim standing alone. Nothing about the *addition* of APA claims undermines that right.

Accordingly, Plaintiffs ask this Court to: (1) require Defendants to identify documents withheld from the administrative record on the basis of privilege; and

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(2) permit Plaintiffs to proceed with discovery outside the administrative record on Count IV of the First Amended Complaint.

II. BACKGROUND

A. This Litigation

Plaintiff States challenge a Final Rule published by the U.S. Department of Homeland Security (DHS), *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (Rule). Plaintiffs allege that the Rule unlawfully redefines the term "public charge"—a previously rare designation that triggers exclusion from the United States—in a way that "penalize[s] legally present immigrant families who access federally-funded health, nutrition, and housing programs." Am. Compl. (ECF No. 31) ¶ 1.

The First Amended Complaint asserts four counts: three under the APA and one, Count IV, under the Equal Protection component of the Fifth Amendment. *Id.* at 161–71. As part of the Equal Protection claim, Plaintiffs allege that the Rule was motivated by intent to discriminate on the basis of race, ethnicity, or national origin. *Id.* ¶ 430. Plaintiffs contend that this unlawful discriminatory intent is evidenced by (among other things) the Rule's "disproportionate adverse impacts on communities of color," the sequence of events leading up to the Rule, and remarks by federal officials—including President Trump and Defendant Kenneth Cuccinelli—reflecting "animus towards non-European immigrants." *Id.* ¶¶ 431–32.

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This Court previously stayed implementation of the Rule under 5 U.S.C. § 705 and also entered a preliminary injunction against implementation of the Rule. *See* ECF No. 162.[1] Defendants have appealed that order, *see* ECF No. 174, and the Court of Appeals granted a stay of the preliminary injunction pending appeal, *see* ECF No. 192. In its stay order, the Ninth Circuit directed that the case "may proceed consistent with this opinion." ECF No. 192 at 73. Today, Plaintiffs will be filing a petition for rehearing en banc with respect to the panel's decision on the stay motion. Defendants' appeal of the preliminary injunction remains pending, with briefing scheduled to be completed by February 7, 2020. See Case No. 19-35914 (9th Cir.), ECF No. 19.

B. Discovery Disputes

Before Defendants produced the administrative record, Plaintiffs asked that DHS provide notice about whether it is withholding any documents on the basis of privilege, and if so, a general description of the documents or categories of documents and the privilege asserted. On November 25, 2019, Defendants produced an index and several zip files that they claim comprise the entire administrative record for the Rule. That production did not include a privilege log or any identification or description of documents withheld.

Plaintiffs reiterated their request for notice and descriptions regarding any

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[1] The Court's decision is also available at *Washington v. United States Dep't of Homeland Sec.*, No. 4:19-CV-5210-RMP, 2019 WL 5100717 (E.D. Wash. Oct. 11, 2019).

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claims of privilege. Defendants responded that, in their view, privileged materials are not part of the administrative record, so nothing was withheld on the basis of privilege.

As to discovery on the Equal Protection claim, Defendants maintain that extra-record discovery is not permitted "[b]ecause this is an APA case." ECF No. 188 at 3; *see also id.* at 4 (stating Defendants' position that "Plaintiffs are not entitled to discovery based on their constitutional claims").

In the parties' most recent joint status report, Defendants confirmed that they dispute Plaintiffs' entitlement to a privilege log and discovery on Count IV of the First Amended Complaint. *See* ECF No. 193 at 2. Plaintiffs submit this motion pursuant to the Court's order dated December 16, 2019.[2]

III. ARGUMENT

A. A Privilege Log Is Necessary To Evaluate Completeness Of The Record

To the extent Defendants withheld any documents on the basis of privilege, the Court should compel production of a privilege log. The APA provides that judicial review of agency action requires reviewing "the *whole* record." 5 U.S.C. § 706 (emphasis added). As the Ninth Circuit has explained, "[t]he 'whole' administrative record . . . consists of all documents and materials directly or indirectly considered by agency decision-makers." *Thompson v. U.S. Dep't of*

[2] In that Order, the Court set a briefing schedule for Plaintiffs' motion and extended the relevant page limits. *See* ECF No. 194.

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Labor, 885 F.2d 551, 555 (9th Cir. 1989) (emphasis omitted). "An inclusive approach to the record, rather than exclusive, promotes transparency vital to meaningful public scrutiny and judicial review." *Kalispel Tribe of Indians v. United States Dep't of the Interior*, No. 2:17-CV-0138-WFN, 2018 WL 9391703, at *1 (E.D. Wash. Mar. 8, 2018).

Although privileged documents may be omitted from the record, it is Defendants' burden to show that a privilege applies. *Tornay*, 840 F.2d at 1426; *see also Alliance for the Wild Rockies v. Pena*, 2017 WL 8778579, at *1 (E.D. Wash. Dec. 12, 2017) (noting, in APA cases, that "[t]he party asserting an evidentiary privilege carries the burden of establishing that the privilege applies"). Furthermore, even where a privilege may *apply* to certain materials, that privilege does not necessarily bar *disclosure*. For example, the deliberative process privilege (which the Government often cites in support of withholding documents from administrative records) "is not absolute," and a litigant may still be able to obtain deliberative materials "if his or her need for the materials and the need for accurate fact-finding override the government's interest in nondisclosure." *Alliance for the Wild Rockies*, 2017 WL 8778579, at *6 (internal quotation marks and citation omitted).[3] Thus, "[an] agency does not have

[3] Plaintiffs note that, where a claim "is directed at the government's intent in rendering its policy decision"—as here with the Equal Protection claim—"the deliberative process privilege evaporates." *Children First Found., Inc. v. Martinez*, No. 1:04-CV-0927, 2007 WL 4344915, at *7 (N.D.N.Y. Dec. 10, 2007); *see also In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir.), *on reh'g in part*, 156 F.3d 1279 (D.C.

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unilateral power to excise material from the record without some sort of record and review." *Kalispel Tribe of Indians*, 2018 WL 9391703, at *2.

Here, the agency record for the Rule suggests that at least some significant documents have been withheld. On several occasions throughout the rulemaking process, DHS has referred to consultation with other federal agencies to justify its positions. In the Notice of Proposed Rulemaking, for example, DHS stated that it reached a conclusion about difficulty of valuing non-cash benefits "following consultation with interagency partners such as HHS and HUD." *Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51,114, 51,165 (Oct. 10, 2018); *see also id.* at 51,218 (noting that "DHS has consulted with the relevant Federal agencies"). And in the Rule, DHS responded to a comment that specifically asked about inter-agency consultation by stating only: "Interagency discussions are a part of the internal deliberative process associated with the rulemaking." 84 Fed. Reg. 41,292, 41,460 (Aug. 14, 2019); *see also id.* at 41,372 (noting that DHS adopted certain exclusion "following consultation with DOD").

In addition, while formulating the Rule, DHS reportedly communicated with high-level executive officials, including White House senior adviser Stephen Miller. In June 2018, Miller emailed L. Francis Cissna, then-Director of DHS sub-agency U.S. Citizenship and Immigration Services (USCIS), that "[t]he timeline on public charge is unacceptable," imploring Cissna to move more

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Cir. 1998) ("If the plaintiff's cause of action is directed at the government's intent . . . it makes no sense to permit the government to use the privilege as a shield.").

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quickly: "I don't care what you need to do to finish it on time." Am. Compl. ¶ 96. Several months later, DHS still had not published the Rule, and Miller reportedly shouted at a White House meeting: "You ought to be working on this regulation all day every day." *Id.* ¶ 112. He continued: "It should be the first thought you have when you wake up. And it should be the last thought you have before you go to bed. And sometimes you shouldn't go to bed."

Despite this evidence that DHS engaged with other agencies as well as the White House in connection with the Rule, the record produced by Defendants does not include any such discussions or communications. Where, as here, Defendants appear to have withheld documents from the administrative record based on privilege, they should be required to submit a privilege log. Although the Ninth Circuit has not definitively established when a privilege log is required, it recently held that compelling the Government to produce such a log was not clear error. *In re United States*, 875 F.3d 1200, 1210 (9th Cir.), *vacated on other grounds*, 138 S. Ct. 443 (2017). As the court observed, "many district courts within this circuit have required a privilege log and *in camera* analysis of assertedly deliberative materials in APA cases." *Id.*

Consistent with the Ninth Circuit's observation, other federal courts in this state have ordered agencies to produce privilege logs in order to test claims of privilege. *See Kalispel Tribe of Indians*, 2018 WL 9391703, at *2 ("If Defendants seek to withhold documents/materials from the record, they must assert a

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privilege as to each specific document/material and create a privilege log."); *Washington v. United States Dep't of State*, No. 2:18-cv-01115-RSL, 2019 WL 1254876, at *2 (W.D. Wash. Mar. 19, 2019) ("To the extent the record produced excludes on the ground of privilege documents the agency in fact considered, . . . it is incomplete and must be supplemented by production of a privilege log."); *see also Alliance for the Wild Rockies*, 2017 WL 8778579, at *2 (noting that federal defendants had provided a privilege log).

Without any information about the types of documents withheld or the privileges asserted, neither Plaintiffs nor the Court can evaluate Defendants' claims of privilege. Plaintiffs therefore request that Defendants be required to provide a privilege log that describes any allegedly privileged documents withheld from Defendants' November 25, 2019 production and identifies the privilege(s) asserted as to each document or category of documents. *See* Fed. R. Civ. P. 26(b)(5) (where a party "withholds information otherwise discoverable by claiming that the information is privileged," the party must "expressly make the claim" and "describe the nature of the documents").

B. Plaintiffs Are Entitled To Discovery On The Equal Protection Claim

Defendants maintain that Plaintiffs may not conduct discovery on Count IV of the First Amended Complaint merely because the Plaintiffs have *also* asserted *separate* APA claims in this same action. That argument is without merit. The rules governing APA claims do not, as Defendants argue, displace

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their obligations to produce discovery under Federal Rule of Civil Procedure 26. Plaintiffs should be permitted to proceed with discovery regarding their independent constitutional claim.

1. The Scope Of Discovery For An Equal Protection Claim Is Broader Than The Scope Of Discovery For An APA Claim

Federal Rule of Civil Procedure 26 permits litigants to "obtain discovery regarding any nonprivileged matter that is *relevant* to any party's claim or defense and *proportional* to the needs of the case." Fed. R. Civ. P. 26(b)(1) (emphasis added). For APA claims, this standard means that discovery is typically limited to the administrative record because the scope of judicial review is confined to "evaluating the agency's contemporaneous explanation in light of the existing administrative record." *Dep't of Commerce v. New York*, 139 S.Ct. 2551, 2573 (2019). The rationale for this "record rule" is that a court reviewing agency action should consider only those materials that were before the agency when it made its decision and should not substitute its own opinion for that of the agency. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971); *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

But constitutional claims—even when asserted alongside APA claims—are not subject to this record limitation. And discovery beyond the administrative record is particularly important where discrimination is alleged. *See Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1061 (9th Cir. 2004) (noting that "discovery[is] often necessary to uncover a trail of evidence regarding the defendants' intent

in undertaking allegedly discriminatory action"); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (describing court's obligation "to smoke out" unlawful conduct in discrimination cases).

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). In conducting that "sensitive inquiry," courts conduct a close examination of the facts concerning the challenged government action, including: (1) "[t]he impact of the [challenged] official action"; (2) "[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes"; (3) "[t]he specific sequence of events leading up to the challenged decision"; (4) "[d]epartures from the normal procedural sequence"; (5) "[s]ubstantive departures . . . , particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached"; and (6) "[t]he legislative or administrative history . . . especially where there are contemporary statements by members of the decisionmaking body." *Id.* at 266–68. These issues are merely some of the "subjects of proper inquiry in determining whether racially discriminatory intent existed." *Id.* at 268.[4]

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[4] The importance of discovery to prove animus has been recognized across a range of anti-discrimination statutes. *See Trevino v. Celanese Corp.*, 701 F.2d 397, 405–06 (5th Cir. 1983) (noting that the "imposition of unnecessary limitations on discovery is especially frowned upon in Title VII cases," as

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But such topics—or any others that may be relevant—cannot be fully investigated based on the administrative record alone. For one thing, "officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority." *Arce v. Douglas*, 793 F.3d 968, 978 (9th Cir. 2015) (quoting *Smith v. Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982)). Moreover, the administrative record may not reflect that decision-makers were motivated by animus because agency officials "may have carefully curated [the record that was produced] to exclude evidence of their true intent and purpose." *New York v. United States Dep't of Commerce*, 351 F. Supp. 3d 502, 668 (S.D.N.Y.) (internal quotation marks omitted), *aff'd in part, rev'd in part and remanded sub nom. Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019).[5]

A full inquiry into Defendants' motives—based on "such circumstantial and direct evidence of intent as may be available"—thus requires evidence

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"'courts have refused to allow procedural technicalities to impede the full vindication of guaranteed rights'" (quoting *Burns v. Thiokol Chem. Corp.*, 483 F.2d 300, 305 (5th Cir. 1973))); *cf. Mt. Holly Garden Citizens in Action Inc. v. Twp. of Mt. Holly*, 658 F.3d 375, 385 (3d Cir. 2011) ("The FHA is a broadly remedial statute designed to prevent and remedy invidious discrimination on the basis of race that facilitates its antidiscrimination agenda by encouraging a searching inquiry into the motives behind a contested policy to ensure that it is not improper." (citation omitted)).

[5] *See also Flores v. Pierce*, 617 F.2d 1386, 1388 (9th Cir. 1980) (evidence supported finding of discriminatory purpose based on testimony that refuted government's asserted rationale); *Saget v. Trump*, 375 F. Supp. 3d 280, 368 (E.D.N.Y. 2019) ("If this case were limited to the administrative record . . . it would be impossible to conduct the full and thorough analysis of direct and circumstantial evidence *Arlington Heights* demands.").

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beyond the administrative record itself. *Arlington Heights*, 429 U.S. at 266; *see also Webster v. Doe*, 486 U.S. 592, 604 (1988) (explaining that district court has latitude to allow discovery related to constitutional claims in APA cases as balanced against countervailing concerns); *Grill v. Quinn*, No. CIV S-10-0757 GEB, 2012 WL 174873, at *2 (E.D. Cal. Jan. 20, 2012) (holding that "discovery as to the non-APA [constitutional] claim is permissible"); *Rydeen v. Quigg*, 748 F. Supp. 900, 906 (D.D.C. 1990) (refusing to consider affidavits outside the administrative record for APA clams, but considering those affidavits as to constitutional challenges), *aff'd*, 937 F.2d 623 (Fed. Cir. 1991).

2. Plaintiffs Have Articulated A Reasonable Basis For Seeking Discovery Outside The Administrative Record To Support Their Equal Protection Claim

Plaintiffs' request for discovery is particularly reasonable given the significant public-record evidence Plaintiffs have already proffered suggesting that certain federal officials may have acted with discriminatory intent in adopting the Rule.

For one thing, Plaintiffs have pointed to statements made by high-ranking Administration officials evincing animus toward immigrants of color. White House senior adviser Stephen Miller—an ardent supporter of the Rule—reportedly told a former White House communications aide, "I would be happy if not a single refugee foot ever touched American soil." Am. Compl. ¶ 89. When Miller briefed the President on immigration issues in June 2017, the President

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reportedly said that immigrants from Haiti "all have AIDS," and complained that immigrants from Nigeria would never "go back to their huts." *Id.* Defendant Kenneth Cuccinelli—the Acting Director of USCIS—has likewise echoed the rhetoric of this Administration. In a 2012 interview, Cuccinelli compared U.S. immigration policy to pest control in DC, specifically referring to "rats" and "raccoons." *Id.* ¶ 90. Since at least 2007, Cuccinelli has repeatedly described the United States as being "invaded" by immigrants along the Southern border. *Id.* And in 2008, as a state senator in Virginia, Cuccinelli introduced legislation that would have allowed employers to fire those who did not speak English in the workplace. *Id.*

Plaintiffs also have proffered evidence of the impact these views had on the agency's decision-making process. As described above, Miller pressed the agency to move faster in adopting the Rule. *See supra* at 6–7. And recently leaked emails suggest that Miller is aligned with—if not supportive of—groups that espouse white nationalist and anti-immigrant views. For example, Miller indicated that he was an avid reader of a white supremacist website called VDARE and the racist conspiracy theory website InfoWars.[6] In his emails, Miller also recommended a racist novel titled "The Camp of Saints," which portrays

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[6] *See* Michael Edison Hayden, *Stephen Miller's Affinity for White Nationalism Revealed in Leaked Emails*, Southern Poverty Law Center (Nov. 12, 2019), *available at* https://www.splcenter.org/hatewatch/2019/11/12/stephen-millers-affinity-white-nationalism-revealed-leaked-emails.

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non-white immigrants as rapists who invade Europe.[7]

In addition to serving as evidence on their own, *see Arlington Heights*, 429 U.S. at 266–68, these statements also suggest that discovery may well uncover further evidence that the Rule was motivated by unlawful discriminatory purpose. At the very least, Plaintiffs are entitled to an opportunity to support their allegations of animus against nonwhite immigrants. In order to conduct the "sensitive inquiry" that a claim of discrimination "demands," Plaintiffs ask the Court to allow limited discovery into "circumstantial and direct evidence" of discriminatory intent. *Id.* at 266.

* * *

The recent litigation about the citizenship question in the 2020 census, *see Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), highlights the importance of appropriate discovery in assessing the purported justifications for this Administration's actions. After numerous disputes before the district court as to the scope of discovery on the plaintiffs' APA claims, the Supreme Court held that extra-record discovery underlying the Administration's decision to add a citizenship question to the decennial census "was ultimately justified." *Id.* at 2574. And, based on the full record presented, the Supreme Court concluded that the evidence "t[old] a story that d[id] not match the explanation the [agency] gave

[7] *Id.*

for [its] decision." *Id.* at 2575.[8] The history of that litigation demonstrates precisely why Plaintiffs should be permitted to test Defendants' claims of privilege and conduct discovery to which they are entitled.

IV. CONCLUSION

Plaintiffs respectfully request that this Court enter an order: (1) compelling Defendants to produce a privilege log of documents that have been withheld from the administrative record as produced on November 25, 2019, and (2) permitting Plaintiffs to conduct discovery on their Equal Protection claim.[9]

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[8] After evidence was unearthed (outside the litigation) reflecting that defendants in that case "withheld documents relating to contacts with the White House[and] contacts with [political strategist] Hofeller," among other materials, plaintiffs sought sanctions. *See Department of Commerce v. New York*, No. 1:18-cv-02921 (S.D.N.Y.), ECF No. 635 at 1, 4, 13. That motion is pending before the district court.

[9] Plaintiffs move the Court for this relief now in an effort to litigate this case in an expeditious manner, but note that they are still in the process of reviewing the record produced on November 25. Plaintiffs reserve their rights to seek further discovery-related relief as necessary, including (but not limited to) completing or supplementing the administrative record, seeking extra-record discovery on their APA claim if appropriate, and challenging any questionable claims of privilege Defendants may assert.

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RESPECTFULLY SUBMITTED this 19th day of December 2019.

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will serve a copy of this document upon all counsel of record.

DATED this 19th day of December 2019, at Seattle, Washington.

/s/ Jeffrey T. Sprung
JEFFREY T. SPRUNG, WSBA #23607
Assistant Attorney General